Supreme Court, U. S.
FILED
MAR 30 1979
MICHAEL RODAK, JR., CLERK

(J-39)

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1404

IRA M. BALL, ET AL.,

Petitioners,

—against—

HUGH L. CAREY, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF NEW YORK, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING CERTIORARI

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Statement

The respondents submit this brief in opposition to the petitioners' application for certiorari to review the decision and order of the Appellate Division of the Supreme Court, Third Department, of the State of New York which unanimously affirmed two orders of the Supreme Court at Special Term which, *inter alia*, dismissed the complaint in this action by which plaintiffs challenged as illegal and unconstitutional the action of the defendant State officials in terminating the operation of the New York State Bingo Control Commission and transferring its functions to the New York State Racing and Wagering Board.

Subsequent to the affirmance by the Appellate Division, the Court of Appeals of the State of New York, on September 26, 1978, granted the respondents' motion to dismiss the petitioners' appeal to that Court which had been taken as of right "upon the ground that no substantial constitutional question is directly involved." On December 6, 1978 the Court

of Appeals denied petitioners' motion for leave to appeal to that Court.

Question Presented

Does the instant application, arising from the abolition of a State agency and the termination of certain of its officers and employees, present any substantial issue warranting review by this Court?

Respondents contend that the lack of merit in petitioners' application is demonstrated by the actions of the New York State Court of Appeals and the memorandum decision of the Appellate Division.

Facts

Petitioners Ball, Freda, Pickney and Murkovit were members of the New York State Bingo Control Commission (hereafter, the Commission) at the time of the adoption of the New York State Budget on April 1, 1975. The remaining petitioners were employees of the Commission.

The Executive Budget for fiscal year 1975-76 recommended abolition of the Commission together with a transfer of its function to the New York State Racing and Wagering Board (hereafter, the Board). The budget contained no recommended appropriation for bingo control activities in the Commission but did recommend an appropriation of $361,000 to the Board for the regulation of bingo.

The State Purposes Budget for fiscal year 1975-76 (Laws of 1975, chap. 50) was signed by Governor Carey on April 7, 1975. The budget did not appropriate funds to the Department of State, of which the Commission had been part, for the regulation of bingo activities. However, the Board received an appropriation of $210,000 to regulate bingo and that agency did in fact proceed to regulate bingo in New York State. Petitioners' services were terminated in April, 1975 as a result of this transfer of function.

This suit was commenced on or about November 24, 1975. The petitioners originally sought declaratory relief, injunctive relief and monetary damages for back salary. The request for injunctive relief (reinstatement to employment) was thereafter abandoned when chapter 46 of the Laws of 1977 (effective April 1, 1977) was enacted specifically providing for abolishment of the Commission and the office of Chairman of the Commission.* Petitioners continued to seek money damages and a declaration as to the validity of the State bingo license fee.

The opinion of the Appellate Division, Third Judicial Department (*Ball* v *Carey*, 64 AD2d 723, 407 NYS2d 76) held that many of the named respondents "would by absolutely immune from liability" (had the complaint stated a cause of action in tort) and the remaining respondents "acted at or under the direction of those who were absolutely immune and there are insufficient allegations to suggest that any one or a combination of them independently effected the discontinuance of plaintiffs' office."

The Appellate Division did not reach the merits of the challenge to the bingo license fee finding that the petitioners did not pay the fee and thus lacked standing to raise a legal challenge thereto.

The petitioners' appeal to the New York Court of Appeals was dismissed "upon the ground that no substantial constitutional question is directly involved" (45 NY2d 837) and petitioners' motion for leave to appeal was likewise denied (NY2d , 12/6/78).

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*In *Ball* v *State*, 41 NY2d 617, the Court of Appeals held that the State purposes budget for 1975-76 did not abolish the Commission or the office of Chairman thereof because specific statutory authority creating same had not been repealed. Such was not the case for the remaining petitioners herein.

ARGUMENT

THE INSTANT APPLICATION PRESENTS NO SIGNIFICANT FEDERAL ISSUES OR QUESTIONS OF CONSTITUTIONAL DIMENSION FOR REVIEW BY THIS COURT.

The main thrust of this action when commenced was to obtain reinstatement to positions which the petitioners contended had not been properly abolished. Any infirmity* which may have existed and any rights which petitioners may have had to return to their positions ended when the New York State Legislature enacted chapter 46 of the Laws of 1977 (effective April 1, 1977). The petitioners conceded this, as they must, for it is well within the power of the sovereign to streamline government and terminate positions as a result of fiscal exigencies (see, e.g., *Farrell* v *Carey*, 62 AD2d 583, app dsmd 45 NY2d 832, cert den US [Feb., 1979]; *Matter of Saur* v *Director of Creedmoor Psychiatric Center*, 41 NY2d 1023 [1977]; *Matter of Blyn* v *Bartlett*, 39 NY2d 349 [1976]).

The petitioners who were Commission members attempted to construct an equal protection argument, but the patent absence of invidious discrimination (e.g., *Dandridge* v *Williams*, 397 US 471 [1970]) and the general lack of merit is obvious to the most cursory inspection and was reflected in the decisions in the New York State Courts.

The remainder of petitioners' action dealt with a challenge to the State imposed bingo license fee and an attempt to impose tort liability upon the respondents. The license fees allegedly violated State law in that the revenues exceeded the cost of the program. The New York Courts properly

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*Under New York State law public offices created by statute may not be abolished by the mere absence of a budgetary appropriation therefor (*Ball* v *State*, 41 NY2d 617 [1977]) but positions in the civil service of the State may be abolished by the absence of an appropriation (*Matter of Buffalo P.B.A. Inc.* v *Makowski*, 56 AD2d 732 [4th Dept, 1977]; *Jones* v *Carey*, 55 AD2d 260 [3d Dept, 1976]).

held, it is submitted, that since the petitioners were not themselves licensees they lacked legal standing to raise this issue. With regard to possible tort liability on the part of the respondents, the New York Courts properly found, it is submitted, that the factual allegations of the complaint were insufficient, and that, in any event, the respondents' immunity under New York law would bar recovery for the tortious conduct attributed to them (*Stukuls* v *State of New York*, 42 NY2d 272).

CONCLUSION

PETITIONERS' APPLICATION FOR CERTIORARI SHOULD BE DENIED.

Dated: March 20, 1979

Respectfully submitted,

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